Supreme Court, U.S.
FILED

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No.

In the

Supreme Court of the United States

BEVERLY FREY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Lawrence R. Jones, Jr.
Counsel of Record
8100 Lomo Alto Drive
Suite 238
Dallas, TX 75225
(214) 696-2661
Attorney for Petitioner

CURRY & TAYLOR • (202) 393-4141 • HTTP://USSCINFO.COM

36 pp

QUESTION PRESENTED

Whether the Court of Appeals for the Fifth Circuit has extended liability under 26 U.S.C. § 6672 beyond the plain statutory language of the statute and has thereby impermissibly encroached upon the role of the jury as fact finder which is in conflict with the law in other circuits.

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No.

In The
SUPREME COURT OF THE UNITED STATES

BEVERLY FREY

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v.

UNITED STATES OF AMERICA

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Petitioner, Beverly Frey, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit that gives rise to this petition is unpublished by order of the Fifth Circuit. It is reprinted in the Appendix attached hereto. (App. p. 1a.) By order filed May 20, 2002, the Fifth Circuit treated the Petition for Rehearing En Banc as a Petition for Panel Rehearing and denied the petition for rehearing. (App. p. 21a.)

JURISDICTION

The Court of Appeals for the Fifth Circuit affirmed the judgment of the District Court on March 19, 2002 (App. p. 1a) and, on May 20, 2002, denied a timely filed petition for rehearing (App. p. 21a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Internal Revenue Code of 1986 (26 U.S.C.):

> SECTION 6672. FAILURE TO COLLECT AND PAY OVER TAX, OR ATTEMPT TO EVADE OR DEFEAT TAX.
>
> (a) GENERAL RULE.
>
> Any person required to collect, truthfully account for, and pay over any tax imposed by this title who willfully fails to collect such tax, or truthfully account for and pay over such tax, or willfully attempts in any manner to evade or defeat any such tax or the payment thereof, shall, in addition to other penalties provided by law, be liable to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over. No penalty shall be imposed under section 6653 or part II of subchapter A of chapter 68 for any offense to which this section is applicable.

STATEMENT

The Internal Revenue Service (hereinafter "IRS") determined that Beverly Frey (hereinafter "Frey") was liable for employment taxes not paid by Pinpoint Communications, Inc. (hereinafter "Pinpoint"). The IRS made an assessment

against Frey for trust fund taxes not paid by Pinpoint. The United States of America (hereinafter "the United States") filed a motion for summary judgment alleging that there were no facts at issue and as a matter of law Frey was liable for the trust fund recovery penalty. The District Court granted the motion. A panel for the Court of Appeals for the Fifth Circuit affirmed stating (App. p. 4a):

> To be sure, this case has given us a moment of pause. **It is uncontradicted that Bromley ordered Frey not to pay these taxes and to instead pay creditors. Clearly, dictates of equity favor her position.** Nevertheless, we are faced with a litany of controlling and unambiguous cases such as *Morgan*, *Howard*, *Gustin* and *Raba*. **These cases provide us with no wiggle room to allow this question–whether Frey was a responsible person under § 6672–to be sent to a fact finder.** [Emphasis added.]

In the Spring of 1993, Patrick G. Bromley (hereinafter "Bromley") made his first investment in Pinpoint in the amount of $500,000. Bromley was invited to join the Board of Directors and became a Board member in March 1993, and was elected Chairman in January 1994. Bromley's investment made him the largest stockholder, owning 15.733% of Pinpoint, and his investment ultimately rose to approximately $4,500,000. At the time Bromley made his first investment, Frey and her husband had previously invested $15,000 in Pinpoint which was approximately 0.13% of the total outstanding stock.

During 1995, Bromley was in charge of Pinpoint and, in addition to making day-to-day management decisions, he made all financial and other decisions that affected Pinpoint. Bromley dominated the decision making of the management committee, and major decisions were not made without consulting Bromley.

Bromley was the person everyone at Pinpoint looked to "when financial matters were brought up." Bromley exercised control over the business of Pinpoint to the extent of not even allowing the company to buy paper clips. Bromley approved expenditures, and eliminated employee's pagers. Bromley made the decision not to pay the public relations agency of Pinpoint, as well as other suppliers. Bromley was in control of Pinpoint and controlled whether the taxes at issue were paid.

Frey was not in charge of Pinpoint or any of its financial matters, and did not have the authority to pay the taxes without the approval of Bromley. When it was necessary to determine what should and should not be paid, everyone looked to Bromley to make that decision. Payments could not be made without the approval of Bromley. Frey did not have the responsibility to make those decisions. Bromley discussed payables and receivables with Frey, and specifically instructed Frey as to which creditors should and should not be paid. Bromley instructed Frey not to pay the taxes at issue, and told her which creditors to pay. Frey had no authority to approve or disapprove which creditors to pay, since Bromley had the authority and responsibility for those financial decisions.

As a matter of convenience **rather than to give her any authority**, Frey was appointed secretary and treasurer so she could sign documents preapproved by other officers. The bylaws of Pinpoint do not define the duties of the secretary and treasurer.

Frey was placed as a signer on the bank account of Pinpoint so she could sign checks up to an amount of $10,000 for payroll and purchases that had been approved by others at Pinpoint. All checks above this amount required two signatures. At no time did Frey have authority to enter into any agreement or contract that had not been preapproved by someone else at Pinpoint. This was done by the department head completing a purchase order.

Bromley invested an additional $500,000 after the taxes became due. The day after the Board of Directors met on October 4, 1995, Bromley and Frey sat down and reviewed the most urgent payables. The September 30th payroll and the October 1st rent had not been paid, so Bromley instructed Frey to pay these immediately, including payroll taxes. The back payroll taxes were at the top of the list presented to Bromley. Bromley said Pinpoint could not afford to pay the taxes and keep Pinpoint running. Bromley specifically told Frey not to pay these taxes. This left about $200,000, one-half of which was paid out to vendors for materials needed by engineering. At that point, Pinpoint had been placed on a COD basis with its vendors. The remaining funds were held to meet emergencies.

On October 25, 1995, Pinpoint closed on an additional $1 million in funding. At that time, Frey sat down with Bromley and once again went over the urgent payables, including the IRS taxes. The October 15th payroll had not been met, and the October 31st payroll and November 1st rent were coming due very soon. Bromley made the decision that the October 15th payroll would be paid in full, including payroll taxes, the employees would receive half pay on October 31st with the related payroll taxes remitted to the IRS, and rent would be paid. Bromley authorized certain other bills for payment including a progress payment on an engineering contract that was approximately $100,000. The employees were informed that they would receive half pay on October 31st, November 15th and November 30th. Funds were reserved to cover these half payrolls and related payroll taxes. Frey had no control over these funds. Once again, Bromley specifically instructed Frey not to pay the past due payroll taxes even though Frey had these taxes listed as payables and asked for them to be paid.

Frey should not be liable in any manner for the trust fund recovery penalty. She was not in a position to be responsible for the collection or payment of funds to any creditor, including the IRS. Frey did not willfully pay other creditors in lieu of the IRS, as she had no control over the

disbursement of Pinpoint's funds, and only signed checks at the direction of Bromley. The payment of taxes was the sole responsibility of Bromley, who owned the majority of the stock and was Pinpoint's major investor. Even though Frey had the titles of secretary and treasurer, she did not have any responsibilities associated with those titles. She was looked upon as just another employee. Frey was not consulted by Bromley on any decision regarding the operation of Pinpoint.

Bromley has brought a lawsuit against certain individuals seeking them to reimburse him for part of the monies he has paid in his settlement of the claim of the United States that he was liable for employment taxes of Pinpoint. **In Bromley's complaint for reimbursement, he has admitted as Chairman of the Board of Pinpoint that he and the Board of Directors failed to take action to have the taxes paid and that they are liable for the taxes it issue**.

REASONS FOR GRANTING THE WRIT

I. This Case Presents An Issue Of Extreme Importance To Taxpayers.

Without varnish, the legal landscape for taxpayers under 26 U.S.C. § 6672 in the Fifth Circuit is not favorable. In regards to the wide net of liability that 26 U.S.C. § 6672 casts, the Eleventh Circuit has stated "the seeds of common sense compassion ... find scant hospitality on this rock hard legal landscape." *Williams v. United States*, 931 F.2d 805, 811 (11th Cir. 1991).

The decisions of the Court of Appeals for the Fifth Circuit have read out of the statute almost any meaning of "willfulness" under 26 U.S.C. § 6672. The Fifth Circuit's decisions have resulted in Section 6672 becoming a strict liability statute even though it has two clear factual thresholds for liability. Because of the Fifth Circuit's rulings and their application under Rule 56 of the Federal Rules of

Civil Procedure, taxpayers are being denied their right to a jury on the issue of responsibility and on the critical subjective intent issue of "willfulness."

It is important that a jury be allowed to make its findings. In *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 501 (1959) *quoting Dimick v. Schiedt*, 293 U.S. 474, 486 (1935), the Court stated (p. 501):

> Maintenance of the jury as a fact_finding body is of such importance and occupies so firm a place in our history and jurisprudence, it is our duty to carefully scrutinize any apparent curtailment of that function.

II. The Recent Trend At The Circuit Level Is To Curb The Government's Power Under 26 U.S.C. § 6672.

A number of courts have protested against the weight of precedent under 26 U.S.C. § 6672. *See Phillips v. Commissioner*, 73 F.3d 939, 943 (9th Cir 1996) (describing authority under 26 U.S.C. § 6672 as "Draconian enforcement power"); *Buffalow v. United States*, 109 F.3d 570, 575 (9th Cir. 1997) (in upholding summary judgment against the taxpayer, the Court commented "we must once again embrace the result of a 'responsible person' case with velleity"); *Williams v. United States*, 931 F.2d 805, 811 (11th Cir. 1991) ("the seeds of common sense compassion sown by the jury find scant hospitality on this rock hard legal landscape"); *Arnett v. United States*, 927 F.Supp. 1464, 1471_72 (D.Kan. 1996) (the Court was "reluctantly compelled" to conclude taxpayer was a responsible person); *Fowler v. United States*, 820 F.Supp. 1390, 1395 n. 2 (D.Wyo. 1993) ("Section 6672 is not a strict liability statute, although after reviewing the case law, one might believe otherwise).

Both the Second and Tenth Circuits have addressed these related issues. Both Circuits have ruled in favor of taxpayers. In *Finley v. Commissioner*, 123 F.3d 1342 , 1345

(10th Cir. 1997); *see also Winter v. United States*, 196 F.3d 339, 347-49 (2nd Cir. 1999) (the Court addressed the issue that the question of fact as to willfulness precludes summary judgment based on the subjective belief of the taxpayer). The Court in *Finley* stated (p. 1345):

> ... [I]t is easy to understand why the government relies so heavily on existing precedent. The en banc question, however, reflects our concern whether this web of case law leaves any role for the jury to determine willfulness. The government's mere reliance on existing precedent does not answer that question.

Both Circuits require that in certain circumstances, taxpayers are entitled to a jury on the subjective intent issue of "willfulness."[1]

III. If the Finder of Fact Could Reasonably Find for the Taxpayer, Summary Judgment is Inappropriate.

It is at the summary stage of the proceedings when a severe injustice may occur under 26 U.S.C. § 6672. This case is an example of how this Circuit's decisions have removed factual determinations from the jury.

The facts upon which liability was held as a matter of law are: 1) Frey owned stock in the company. 2) Frey was an officer. 3) She had signing authority (up to $10,000). 4)

---

[1] "The issue of willfulness is necessarily directed to the state of the responsible person's mind, a subjective determination." *Mazo v. United States*, 591 F.2d 1151, 1157 (5th Cir. 1979); *Thibodeau v. United States*, 828 F.2d 1499, 1505 (11th Cir. 1987); *Turpin v. United States*, 970 F.2d 1344, 1350 (4th Cir. 1992); *Finley v. United States*, 123 F.3d 1342, 1347 (10th Cir. 1997) (*en banc*) (willfulness "is properly characterized as an issue of scienter ... .").

She knew of the unpaid taxes and signed checks. (App. p. .)

The facts that a jury should have been able to consider are: 1) Frey owned less than one half of one percent of the stock. 2) Frey was an officer and signatory on company accounts for mere convenience. 3) Frey was not in charge of Pinpoint. 4) She was not in charge of financial matters. 5) Frey did not have the authority to pay taxes without the approval of Bromley. 6) No payments could be made without approval of Bromley. 7) The facts also show that Bromley has admitted, as Chairman of the Board of Pinpoint, that he and the Board of Directors failed to take action to have the taxes paid and that they are liable for the taxes at issue. 8) Frey could only sign checks up to the amount of $10,000. 9) "[I]t is uncontradicted that Bromley **ordered** Frey not to pay these taxes and to instead pay creditors." (App. p. 4a.) [Emphasis added.]

A reasonable finder of fact, based on the above facts and the subjective intent of the taxpayer, could reasonably find for Ms. Frey. As stated by the Court in *Winter*, *supra* (p. 349):

> In sum, the evidence introduced by the parties on the question of willfulness is conflicting and susceptible of a least two reasonable interpretations. As a result, the district court erred in finding as a matter of law that the Counterclaim Defendants acted willfully as required by section 6672(a).

IV. The Circuit's Decisions Lead to a Logical Fault.

It has long been held that one who so controls a company as to direct its operations can be held liable under 26 U.S.C. § 6672 without being an officer, director, or having check signing authority. *Commonwealth National Bank of Dallas v. United States*, 665 F 2d 743, 754-57 (5th Cir. 1982); *Neckles v. United States*, 579 F 2d 938 (5th Cir. 1978).

If that is true on one end of the Section 6672 spectrum, then logically it follows that at the other end of the spectrum the same analysis applies. Taxpayers may not be liable even when they are an officer or director who has check signing authority if they lack actual control and authority to pay the taxes. A determination by the finder of fact as to actual control is necessary to avoid injustice.

However, under the Fifth Circuit's precedent, as applied in summary judgment, the officer with check signing authority **is denied the opportunity to show that he or she is the exception**. In addition, the officer with check signing authority **is denied the opportunity to present the finder of fact with evidence** of subjective intent and show the lack of actual authority to compel payment of the taxes.

CONCLUSION

The holding below conflicts with the key case authority cited as authority for the holding. This case presents this Court an opportunity to affirm that Congress was serious in imposing the liability on those persons who actually control the corporation and not on those who do not.

Petitioner respectfully requests the Court to grant the petition.

Respectfully submitted,

Lawrence R. Jones, Jr.
Counsel of Record
Townsend & Jones, L.L.P.
8100 Lomo Alto
Suite 238
Dallas, Texas 75225
(214) 696-2661
Attorney for Petitioner

(Any footnotes trail end of each document)

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BEVERLY FREY,
Plaintiff-counterdefendant,

VS.

UNITED STATES OF AMERICA,
Defendant-counterplaintiff.

Filed March 19, 2002

Appeal from the United States District Court
for the Northern District of Texas
3 :99-CV-831-D

Before ALDISERT*, DAVIS, and PARKER, Circuit Judges.

PER CURIAM: **

This case involves a $284,770 tax assessment under 20 U.S.C. § 6672 against Beverly Frey, a former corporate officer of Pinpoint Communications. The IRS issued the assessment for failing to pay the employment taxes withheld from the wages of Pinpoint employees. Frey paid $100 of the assessment and brought suit against the United States for a refund of that $100. The government filed a counterclaim for the unpaid balance of the assessment. The district court granted summary judgment for the government. Frey now appeals this decision.

Other minor issues are involved. However, our principal task is to decide whether the district court erred in determining that--as a taxpayer--Frey was a "responsible persons under 6672. fn1

I.

Patrick Bromley was Pinpoint's primary investor, CEO, and Chairman of the Board. According to Frey, Bromley was the dominant figure in the corporation, controlling all financial matters. Only Bromley allegedly had the authority to decide whether suppliers would be paid, when taxes would be paid, and how much those tax payments would be.

During the third and fourth quarters of 1995, Pinpoint failed to pay the government taxes it had withheld from its employees' wages during the third and fourth quarters of 1995, totaling $284,870.31. By August 1996, Pinpoint had filed for bankruptcy under Chapter Seven, and bad begun to liquidate. The overdue taxes, incidentally, remained unpaid.

On February 18, 1999, the IRS made a $284,780 assessment against the taxpayer under § 6672 for the unpaid withholdings during the third and fourth quarters of 1995. The IRS sent Prey notice of the assessment and a demand for payment. The notice and the demand was sent to Frey's correct address, though it misstated her social security number. fn1

Frey paid $100 of the assessment and brought this suit for a refund. The government counterclaimed for the unpaid balance of the assessment and also filed a third party complaint against Bromley for his failure to pay the employment taxes pursuant to §6672. Bromley and the government reached a settlement in the amount of $158,000, to be paid by Bromley. fn2

Sections 6672 and 6671(b) impose personal liability for the amount of the taxes due upon those officers and agents of the employer who are "responsible" for failing to pay and who act "willfully" in failing to pay. Whether an individual is a "responsible person" is essentially a question for the fact-finder. Barnett v. I.R.S., 988 F.2d 1449 (5th Cir. 1993)

The crux of the inquiry involves determining whether the individual had the "effective power" or "actual authority or

ability" to pay the taxes. Id. We have heretofore set forth six factors to be considered in determining whether a person has the "effective power" to pay taxes. Logal v. U.S., 195 F.3d 229, 232 (5th Cir. 1999). Those six factors analyze whether the individual: (1) is an officer or member of the board of directors; (2) owns a substantial amount of stock in the company; (3) manages the day-to-day operations of the business; (4) has the authority to hire or fire employees; (5) makes decisions as

to the disbursement of funds and payment of creditors; and (6) possesses the authority to sign company checks. Id.

In applying these factors we have held that all responsible persons- -not simply the most responsible person–are liable for unpaid taxes. Morgan v. U.S., 937 F.2d 281, 284 (5th Cir. 1991).

A person with a duty to pay taxes cannot absolve herself of liability merely because a superior instructed her not to pay taxes, or because the supervisor threatened to fire her if she paid the taxes. Howard v. U.S., 711 F.2d 729, 734-725 (5th Cir. 1983); Gustin v. U.S., 876 F.2d 485, 491-492 (5th Cir. 1989) Morgan, 937 F.2d at 284. A person will be held to be responsible even if he does not have final authority to determine which bills are paid, so long as he has "significant control over disbursements." Raba v. U.S., 977 F.2d 941 (5th Cir. 1992).

As Treasurer/Secretary, Frey was an officer of the corporation. She managed the day-to-day accounting operations of the business. This included dealing with independent auditors, paying employment taxes, signing payroll checks, and preparing financial statements for the Board of Directors. She participated in the hiring decisions in the accounting department. The evidence indicates that she had the authority to authorize purchases for the accounting department up to $5,000.

In one case, Frey authorized the issuance of a several hundred thousand dollar purchase order. Under precedent set forth in Baba, Frey need not have had final authority to determine which bills were paid, so long as she had significant control over the disbursements. Prey had the authority to sign checks up to $10,000 on her own, and the authority to sign checks above that amount with a co-signer.

Distilled to its essence, Frey's primary argument is that Bromley had more authority than she to insure that taxes were paid; Bromley told her not to pay the delinquent taxes; and did not have final control over which creditors to pay.

To be sure, this case has given us a moment of pause. It is uncontradicted that Bromley ordered Frey not to pay these taxes and to instead pay creditors. Clearly, dictates of equity favor her position. Nevertheless, we are faced with a litany of controlling and unambiguous cases such as Morgan, Howard, Gustin and Raba. These cases provide us with no wiggle room to allow this question- -whether Frey was a responsible person under §6672–to be sent to a fact finder. On the basis of supporting data filed with the summary judgment motion, we hold that she is a responsible person under § 6672.

II.

We now address the question of whether Frey- - a responsible person–also acted willfully. Under § 6672, willfulness entails a voluntary, conscious, and intentional act. It does not require a bad motive or evil intent. A responsible person's decision not to pay withholding taxes does not cease to be willful because the person is ordered by another not to pay. Morgan, 937 F.2d at 285-286; see also Howard, 711 F.2d at 736 ("A considered decision not to fulfill one's obligation to pay the taxes owed, evidenced by payments made to other creditors in the knowledge that the taxes are due, is all that is required to establish willfulness.")

* * * * *

We conclude, therefore, that the district court did not err in ruling in favor of the government.

We have considered all contentions presented by the parties and conclude that no further discussion is necessary.

The judgment of the district court is affirmed.

Footnotes

*Circuit Judge of the Third Circuit Court of Appeals, sitting by designation.

**Pursuant to 5th Cir. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th CIR. R. 47.4.

fn1 Title 20 U.S.C. § 6672 provides in relevant part:

(a) General Rule. Any person required to collect, truthfully account for, and pay over any tax imposed by this titleS who willfully fails to collect such tax, or truthfully accounts for and pay over such tax, or willfully attempts in any manner to evade or defeat any such tax or the payment thereof, shall, in addition to other penalties provided by law, be liable to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over.

(b) defines "person" to include "an officer or employee of a corporation . . . who as such officer, employee or member is under a duty to perform the act in respect of which the violation occurs."

fn1 We reject Frey's argument that she did not receive proper notice because the notice and demand letter she received misstated her social security number. code § 6303(a) requires the notice to state the amount of the assessment and demand payment. Here, the notice and demand letter was sent to both the correct person and the correct address. Additionally, it properly stated the amount of the assessment against

Appellant and demanded payment from her.

fn2 There is no dispute that Frey will be entitled to a credit for the amount collected from Bromley.

Civil Action No. 3:99-CV-0831-D

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF TEXAS,
DALLAS DIVISION

BEVERLY FREY,
Plaintiff-counterdefendant,

VS.

UNITED STATES OF AMERICA,
Defendant-counterplaintiff.

May 4, 2001, Decided

May 4, 2001, Filed; May 7, 2001, Entered

COUNSEL:
For BEVERLY FREY, plaintiff: Lawrence R Jones, Jr, Attorney at Law, Townsend & Jones, Dallas, TX USA.

For UNITED STATES OF AMERICA, defendant: Jon E Fisher, Attorney at Law, US Department of Justice, Dallas, TX USA.

For FIELDING NMN COCKE, movant: Sarah A Duckers, Attorney at Law, Vinson & Elkins, Houston, TX USA.

For UNITED STATES OF AMERICA, counter-claimant: Jon E Fisher, Attorney at Law, US Department of Justice, Dallas, TX USA.

For UNITED STATES OF AMERICA, third-party plaintiff: Jon E Fisher, Attorney at Law, US Department of Justice, Dallas, TX USA.

JUDGES:
SIDNEY A. FITZWATER, UNITED STATES DISTRICT JUDGE.

OPINION BY:
SIDNEY A. FITZWATER

OPINION:

MEMORANDUM OPINION AND ORDER

The court must decide in this case whether the plaintiff-counterdefendant is a "responsible person" who willfully failed to pay to the Internal Revenue Service ("IRS") employment taxes withheld by her corporate employer. The court must also resolve whether the IRS assessment is invalid because it lists an incorrect social security number for the plaintiff-counterdefendant.

I

This case arises from the failure of Pinpoint Communications, Inc. ("Pinpoint") to pay employment taxes to the IRS for the third and fourth quarters of 1995. Pinpoint sought to develop and market a fleet management system that would allow fleet operators, such as cab company dispatchers, to locate and communicate with individual members of the fleet. Patrick G. Bromley ("Bromley") ran Pinpoint as its Chief Executive Officer and Chairman of the Board. He was also Pinpoint's largest stockholder. Bromley exercised final decision making authority over the business, including the approval of certain expenditures and the power to hire and fire employees.

Pinpoint struggled to achieve its goal of profitability. In the second half of 1995, it failed to pay its federal payroll taxes in full. Eventually, it was no longer able to cover operating expenses, and filed for chapter 11 bankruptcy protection on February 1, 1996. It reserved the last of its funds to pay a bankruptcy attorney, relying on a personal check from a board member to satisfy the full fee. In August 1996 Pinpoint's chapter 11 reorganization was converted to a chapter 7 liquidation and the United States Trustee auctioned off all of Pinpoint's assets. At no point did Pinpoint pay the overdue payroll taxes for the third and fourth quarters of 1995.

The IRS, acting pursuant to *26 U.S.C. §6672*, assessed plaintiff-counterdefendant Beverly Frey ("Frey") the sum of $ 284,870.31 on February 18, 1999, seeking to hold her liable by statute as a "responsible person" who had willfully failed to pay over the withheld employment taxes to the IRS. Frey was Pinpoint's Secretary, Treasurer, and Controller, and the head of its Accounting Department. She was also a minor Pinpoint shareholder. Frey paid $ 100 of the assessment and then sued defendant-counterplaintiff United States of America ("the government") to recover that sum plus statutory interest. The government counterclaimed to recover $ 284,770.31–the unpaid part of the assessment–plus interest and all statutory additions provided by law. The government also filed a third-party complaint against Bromley, but later reached a settlement with him and dismissed the third-party action. Only the claims between the government and Frey remain to be litigated. The government now moves for summary judgment, arguing that Frey is a "responsible person" under § 6672 who acted willfully in failing to pay the payroll taxes. n1 It seeks dismissal of her claim and recovery on its counterclaim.

II

The relevant law regarding liability under § 6672 for unpaid employment taxes is familiar and need not be recounted at length. Federal law requires that employers withhold from their employees' paychecks their shares of federal social security taxes and income taxes. *See Barnett v. IRS, 988 F.2d 1449, 1453 (5th Cir. 1993)* (citing *26 U.S.C. § §3102* and 3402). The employer holds the withheld taxes "in trust" for the United States and must pay them over to the government. *Id.; Wood v. United States, 808 F.2d 411, 414 (5th Cir. 1987)*. If an employer withholds the taxes from its employees but fails to remit them, the government must nevertheless credit the employees for having paid the taxes and seek the unpaid funds from the employer. Section 6672(a) imposes liability for these delinquent taxes not only on the corporate employer but on any person, including a corporate officer or employee, who is required to collect, truthfully account for, or pay over any tax–commonly referred to as "responsible persons" n2 –who willfully fails to

do so. *See Barnett, 988 F.2d at 1453.* This penalty is "separate and distinct from the liability imposed on the employer to remit the trust fund taxes." *Stallard v. United States, 12 F.3d 489, 493 (5th Cir. 1994)* (per curiam) (footnote omitted). Section 6672 provides the government recourse for collection of the taxes by allowing it to reach the persons responsible for causing the company's failure to pay the taxes. *See Newsome v. United States, 431 F.2d 742, 745 (5th Cir. 1970)* (citations omitted).

To establish liability against Frey, the government must demonstrate that (1) she is a responsible person (2) who willfully failed to pay over the taxes. *Barnett, 988 F.2d at 1453.* Once the government offers a § 6672 assessment into evidence, the taxpayer bears the burden of disproving her responsible person status or willfulness. *Id.* Frey, as the plaintiff who seeks a refund of a partial payment of a § 6672 penalty, has the burden of proving that she is not a responsible person, even where, as here, the government has counterclaimed for the remainder of the tax. *Morgan v. United States, 937 F.2d 281, 285 (5th Cir. 1991)* (per curiam) (adopting opinion of Fitzwater, J.) (citing *Liddon v. United States, 448 F.2d 509, 513-14 (5th Cir. 1971)).*

III

Frey first contends the original assessment against her is invalid because it lists an incorrect social security number and that the IRS failed to make a correct assessment via Form 4340 before the statute of limitations expired. She maintains that the assessment against her is invalid and that the court does not have jurisdiction over this case. n3

Before the penalty may be imposed, the government must properly notify the responsible party about the assessment. *Stallard, 12 F.3d at 493.* Pursuant to *Treasury Regulation § 301.6203-1*--the regulation governing assessments--the summary record of the assessment must include the identity of the taxpayer, the character of the liability assessed, the taxable period, if applicable, and the amount of the assessment. "If the summary record is properly supported through a Form 4340, the assessment contained in that summary record is considered presumptively valid[.]" *Id.*

Although the social security number listed on the original assessment actually belongs to a "Beverly Frey" from Houston, Texas, it is not the correct number for the Frey who is the plaintiff-counterdefendant in the present case.

Frey argues that by the time the IRS corrected this error and submitted a Form 4340 with the proper social security number, the statute of limitations had expired, thereby rendering the assessment invalid. In support of her argument, Frey cites *Stallard*, in particular the Fifth Circuit's characterization of the district court's holding in that case. *Stallard* does not support her position. In *Stallard* the Fifth Circuit held that the district court had incorrectly interpreted *Brafman v. United States, 384 F.2d 863, 865 (5th Cir. 1967)*, to require that all provisions of *Treasury Regulation § 301.6203-1* must be met within the limitations period. *Stallard, 12 F.3d at 493.* Correcting this misinterpretation, the Fifth Circuit emphasized that it is the date of the assessment itself, not of the supporting record, that is relevant for resolving statute of limitations issues. *Id.*

Because the date of the Form 4340 does not render the original assessment untimely in the instant case, the court must now decide whether the erroneous social security number invalidates the assessment. Frey cites no authority to support her contention that it does. In fact, Treasury Regulations require only that "the summary record, through supporting records, shall provide identification of the taxpayer[.]" *Treas. Reg. § 301.6203-1.* Frey was identified by name and does not contend that she failed to understand the nature of the penalty. The Fifth Circuit has held that "a notice of assessment and demand for payment that contains a technical error will be held valid where the taxpayer has not been misled by the error." *Sage v. United States, 908 F.2d 18, 22 (5th Cir. 1990)* (citing *Allan v. United States, 386 F. Supp. 499 (N.D. Tex. 1975)* (Porter, J.) (holding that wrong name of company did not invalidate assessment)). Absent proof that would permit a reasonable trier of fact to find that Frey was misled by the misinformation contained in the original assessment, the court declines to hold that it is invalid on this basis.

IV

Because the government has introduced the assessment in evidence, the burden has shifted to Frey to prove either that she is not a "responsible person" or that she did not act willfully. At the summary judgment stage, she need only adduce evidence that creates a genuine issue of material fact.

A

The Fifth Circuit "takes a broad view of who is a responsible person under § 6672." *Logal v. United States, 195 F.3d 229, 232 (5th Cir. 1999)* (citing *Barnett, 988 F.2d at 1454)*. "In a great number of cases, [the Fifth Circuit] has held that a party was a 'responsible person.'" *Barnett, 988 F.2d at 1454 n.10* (collecting cases). Whether Frey is a responsible person "turns on [her] status, duty, and authority." *Turnbull v. United States, 929 F.2d 173, 178 (5th Cir. 1991)*. "The crucial inquiry is whether the individual had the effective power to pay the taxes." *Id.* (citing *Howard v. United States, 711 F.2d 729, 734 (5th Cir. 1983))*. This inquiry asks whether she "had the actual authority or ability, in view of [her] status within the corporation, to pay the taxes owed." *Barnett, 988 F.2d at 1454*. The court looks to six nonexclusive factors to determine responsibility pursuant to §6672, considering whether the person (i) is an officer or member of the board of directors; (ii) owns a substantial amount of stock in the company; (iii) manages the day-to-day operations of the business; (iv) has the authority to hire or fire employees; (v) makes decisions as to the disbursement of funds and payment of creditors; and (vi) possesses the authority to sign company checks. *Logal, 195 F.3d at 232* (quoting *Barnett, 988 F.2d at 1455)*. "No single factor is dispositive." *Barnett, 988 F.2d at 1455*.

B

The government contends that it has introduced in support of its motion evidence that precludes Frey from creating a genuine fact issue concerning whether she is a "responsible person." The court agrees.

1

Frey testified that she was the head of Pinpoint's Accounting Department, became the company Controller in 1993, and held the offices of Secretary and Treasurer by mid-1994. As a result of her responsibilities, Frey had an intimate knowledge of Pinpoint's financial situation. She admitted that she handled Pinpoint's day-to-day accounting functions. Frey also acknowledged that she dealt with the company's outside independent auditors and was a member of the Pinpoint management team. She was authorized to provide the sole signature on checks for up to $ 10,000 and was the person who usually signed employee payroll checks. Frey was a Pinpoint stockholder and prepared financial statements and made financial reports to the Board of Directors at least quarterly. Before Pinpoint's affiliation with Price Waterhouse, Frey was responsible for generating the internal financial reports. She was but one of a handful of employees who had access to computerized company records, including the general ledger and the accounts payable. Frey was familiar with Pinpoint's bank accounts and, as one of two trustees of Pinpoint's 401(k) plan, was a defendant in a Department of Labor action for Pinpoint's failure to pay over 401(k) contributions. She also participated heavily in generating financial projections regarding when Pinpoint would become profitable.

2

Frey attempts in her summary judgment response to avoid "responsible person" liability by characterizing Bromley–the Pinpoint CEO and Board Chairman–as the person who had authority to pay the taxes, and by minimizing her own power. She contends that despite her titles and formal authority, Bromley's overwhelming control of the daily operations at Pinpoint prevented her from exercising the necessary practical authority to be considered a responsible person under § 6672. Her arguments are unavailing, however, and her evidence fails to raise a genuine issue of material fact that requires a trial.

Frey argues that her status as the company's Secretary, Treasurer, and Controller was merely titular and that

Bromley made all significant decisions regarding finances. She asserts that she constantly acted only under Bromley's direction and had no power to act without his approval. Furthermore, in an attempt to illustrate their relative interest in and control over Pinpoint, she compares her stock ownership--0.13%-- to Bromley's outlay of approximately $ 4.5 million. The fact that Bromley exercised more influence and control over the operations of Pinpoint does not mean that Frey was not also a responsible person. The Fifth Circuit has recognized that "there may be--indeed, there usually are-- multiple responsible persons in any company." *Barnett, 988 F.2d at 1455.* Section 6672 "applies to all responsible persons, not just to the most responsible person." *Gustin v. United States, 876 F.2d 485, 491 (5th Cir. 1989).* A host of persons have been held liable as responsible persons even though they did not exercise final decision making authority over all the operations of the company. *See Howard, 711 F.2d at 734* (citing cases in which persons have been held to be "responsible," despite existence of another person with more significant control over company decisions). The focus, therefore, is not upon whether Bromley exercised more authority than did Frey, but upon whether Frey had the status, duty, and authority that gave her effective power to pay Pinpoint's delinquent payroll taxes.

Concerning her control over Pinpoint's operations, Frey contends that she had neither effective power to pay taxes nor significant authority in the general management and financial decision making of the corporation. n4 In particular, she focuses on her limited authority to make employment decisions. She asserts that outside the Accounting Department, she lacked the authority to hire and fire employees and to participate in these decisions. She points out that although she had the authority to participate in Accounting Department hiring decisions, the persons hired for these positions had to be approved by others, and that she was involved in the hiring of only two employees. This evidence does not create a genuine issue of material fact on whether she was a responsible person. *See Gustin, 876 F.2d at 492* (holding that party was responsible person despite limited authority to hire employees). Her inability to make

final employment decisions outside the Accounting Department did not prevent her from exercising sufficient power within that department to ensure that Pinpoint paid its taxes. Moreover, authority to make employment decisions within the Accounting Department, even if not unilateral, would only permit a reasonable trier of fact to find that she did exercise significant control over Pinpoint's operations.

Frey contends that even if she did possess some degree of control over the operations of Pinpoint, her authority did not extend to the financial operations of the company. She maintains that she did not have the effective authority to pay the taxes because that power rested exclusively with Bromley. She argues that Bromley, not she, was the person with authority to direct the payment of creditors. The focus under §6672, however, is not on who is the most responsible person, but whether the person in question had the effective power to pay the taxes. Even if she was not the "one with ultimate authority over expenditures of funds," P. Br. 19, a reasonable trier of fact could only find that she was intimately involved in Pinpoint's financial operations. She handled the day-to-day accounting functions, dealt with outside auditors, had access to financial records, and generated financial reports for the Board of Directors. Bromley's relatively greater control does not create a fact issue as to whether Frey had sufficient authority over the financial operations of the company to pay the delinquent taxes.

Moreover, Frey does not dispute that she possessed the power to provide the sole signature on checks under $ 10,000 and usually signed employees' paychecks. She attempts to draw a distinction, however, between the right to sign a check and the requirement that, before she did so, she obtain someone else's approval. Frey maintains that Bromley's authorization was necessary before she could sign a check. She also relies on the fact that Pinpoint policy prohibited her from engaging in "piecemealing," *i.e.*, dividing what was in fact a single expenditure into two or more disbursements to circumvent limits on expense authority. She reasons that because two signatures were required on a check that exceeded $ 10,000, and in view of the "piecemealing" policy

and Bromley's tight control of Pinpoint's finances, she would have been required to obtain a cosignor's signature to make a tax payment in full to the IRS.

The fact that Frey's check writing authority was circumscribed by company policy and Bromley's extensive powers over Pinpoint operations does not create a material fact issue because persons with even limited check writing authority have been held to be responsible persons. *See Gustin, 876 F.2d at 492.* Frey has submitted no evidence that she *attempted* to use her check writing authority to pay the taxes. *See id.* (noting that responsible person who only had authority to provide sole signature on checks under $ 2,500 never showed that he had requested and was denied authority to pay the tax bill). Finally, she cannot escape responsible person status by claiming that Bromley explicitly directed her not to pay the taxes and to pay other creditors instead. Although the difficulty of her situation is indubitable, the Fifth Circuit has affirmed liability despite the fact that an individual would have been terminated had she paid the payroll taxes. *See Howard, 711 F.2d at 734-35.*

The evidence adduced by the government establishes that Frey's status and duties, and her authority over financial matters and access to company funds, provided her with the effective power to pay Pinpoint's delinquent payroll taxes. In her response, she has failed to introduce evidence that would permit a reasonable trier of fact to find that she was not a responsible person under § 6672. The government is therefore entitled to summary judgment on this issue.

V

If an individual is a "responsible person" under §6672, then to avoid liability she must prove that she did not act willfully. *See Morgan, 937 F.2d at 286* ("The responsible person bears the burden of proving her actions were not willful.").

A

"The willfulness inquiry is the sifter in most §6672 cases." *Barnett, 988 F.2d at 1457.* "Willfulness under §6672 requires only a voluntary, conscious, and intentional act, not a bad

motive or evil intent." *Id.*; *Morgan*, *937 F.2d at 285*. "A responsible person acts willfully if she knows the taxes are due but uses corporate funds to pay other creditors, or if she recklessly disregards the risk that the taxes may not be remitted to the government." *Logal*, *195 F.3d at 232* (citations omitted). Moreover, "[a] responsible person who learns of the underpayment of taxes must use later-acquired unencumbered funds to pay the taxes; failure to do so constitutes willfulness." *Id.* "Willfulness is normally proved by evidence that the responsible person paid other creditors with knowledge that withholding taxes were due at the time to the United States." *Barnett*, *988 F.2d at 1457*. "A considered decision not to fulfill one's obligation to pay the taxes owed, evidenced by payments made to other creditors in the knowledge that the taxes are due, is all that is required to establish willfulness." *Howard*, *711 F.2d at 736*.

B

The government has submitted evidence that Frey knew of the unpaid payroll taxes from the time they first went unpaid and knew that Pinpoint never paid them. Frey does not dispute that in 1995 she was intimately aware of Pinpoint's financial difficulties and its failure to pay the taxes. In particular, she does not deny that she knew that Pinpoint had not met the September 30, 1995 payroll, the October 1, 1995 rent, and overdue employment taxes. When Frey informed Bromley in October that funds were insufficient to make these payments, he directed her not to pay the taxes. Pinpoint eventually received more funding later that month. Bromley and Frey then discussed the most urgent debts, including the employment taxes, and the decision was made to pay the October 15 payroll in full, including payroll taxes. On October 31, November 15, and November 30, employees received half pay and the applicable taxes were remitted to the IRS. Pinpoint did not, however, pay the overdue employment taxes. Throughout this period, during which other debts were satisfied and Frey herself even received a paycheck, she remained aware that Pinpoint had not repaid overdue payroll taxes.

Frey argues that she did not act willfully because Bromley exercised overwhelming control over company funds. She suggests that Bromley's direction not to pay the overdue taxes precludes a finding that she acted willfully. These arguments would not permit a reasonable trier of fact to find in Frey's favor. The Fifth Circuit has explicitly held that a responsible person who knows of her employer's delinquent payroll taxes acts willfully regardless of her superior's instruction not to pay the taxes. *See Howard, 711 F.2d at 735-36.* A reasonable trier of fact could only find that Frey knew of the tax deficiencies and Pinpoint's persistence in satisfying other debts before paying the delinquent taxes, and thus find that Frey acted willfully.

Once Frey "became aware of the tax liability, [she] had a duty to ensure that the taxes were paid before any payments were made to other creditors." *Barnett, 988 F.2d at 1457* (citing *Mazo v. United States, 591 F.2d 1151, 1154 (5th Cir. 1979)).* The government's undisputed evidence that she failed to do so establishes willfulness as a matter of law. *Id.* (citing *Howard, 711 F.2d at 735; Mazo, 591 F.2d at 1157).* Neither Bromley's relative degree of control over Pinpoint nor his direction not to pay the taxes raises a genuine issue of material fact about Frey's knowledge of the delinquent taxes. Accordingly, the government is entitled to summary judgment.

* * *

The government's motion for summary judgment is granted. It is entitled to dismissal of Frey's action against it and to recover from Frey the sum of $ 284,770.31, plus interest and all statutory additions provided by law. The government has settled with Bromley and indicates that it will credit Frey for any payments that Bromley has made. Accordingly, the judgment that the court files today is entered with the explicit proviso that Frey is entitled to a credit against the judgment for any payment that Bromley has made to the government.

SO ORDERED.

May 4, 2001.

SIDNEY A. FITZWATER

UNITED STATES DISTRICT JUDGE

JUDGMENT

For the reasons set out in a memorandum opinion and order filed today, it is ordered and adjudged that the action of plaintiff-counterdefendant Beverly Frey ("Frey") against defendant-counterplaintiff United States of America ("United States") is dismissed with prejudice. It is further ordered and adjudged that the United States shall recover judgment against Frey in the principal sum of $ 284,770.31, plus interest and all statutory additions provided by law, together with post judgment interest thereon at the rate of 3.82% per annum. It is further ordered and adjudged that Frey shall be entitled to a credit against this judgment for any payment that Patrick G. Bromley has made to the United States.

Taxable costs of court, as calculated by the clerk of court, are assessed against Frey.

Done at Dallas, Texas this 4th day of May, 2001.

SIDNEY A. FITZWATER

UNITED STATES DISTRICT JUDGE

Footnotes:

n1 The court has not considered for any purpose the government's reply appendix filed February 8, 2001 because it is impermissible under either the pre-1998 or the present summary judgment rules. *See Tovar v. United States, 2000 U.S. Dist. LEXIS 5044, 2000 WL 425170,* at *4 n.8 (N.D. Tex. Apr. 18) (Fitzwater, J.), *aff'd, 244 F.3d 135* (5th Cir. Dec. 12, 2000) (table) (per curiam).

n2 *See Barnett, 988 F.2d at 1453 n.6* (noting that cases decided under § 6672 generally refer to such persons as "responsible persons").

n3 Frey does not cite any authority for the proposition that the operation of a limitations bar deprives this court of jurisdiction, nor does she elaborate on this assertion

elsewhere in her brief or explain how, if the court lacks jurisdiction, it has the power to grant her the relief she seeks in her suit against the government.

n4 Frey relies on the Federal Circuit's reasoning in *Godfrey v. United States, 748 F.2d 1568, 1575 (Fed. Cir. 1984)*, to argue that she did not participate in day-to-day management of the company. In *Godfrey* the Federal Circuit compared the limited authority of the petitioner in that case to that of the taxpayer in *White v. United States, 178 Ct. Cl. 765, 372 F.2d 513, 514-15 (Ct. Cl. 1967)* (per curiam), in which responsible person status was found. *Godfrey's* reasoning, therefore, is not, as Frey contends, a definition of day-to-day management. Rather, it is a description of the duties of one particular person who was found to be a responsible person in a case that is not binding authority on this court. The court declines to adopt this description as a definition of day-to-day management when the Fifth Circuit has provided sufficient guidance on this issue.

No. 01-10870

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BEVERLY FREY,
Plaintiff-counterdefendant,

VS.

UNITED STATES OF AMERICA,
Defendant-counterplaintiff.

Filed May 20, 2002

Appeal from the United States District Court
for the Northern District of Texas, Dallas

ON PETITION FOR REHEARING EN BANC

Before ALDISERT*, DAVIS, and PARKER, Circuit Judges.

PER CURIAM:

Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (Fed. R. App. P. and 5th Cir. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

United States Circuit Judge

Footnotes

* Circuit Judge of the Third Circuit Court of Appeals, sitting by designation.